IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 631

IN THE MATTER OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, DEBTOR.

ISRAEL A. ABRAMS, ET AL., ETC.,
Petitioners,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET, AL.,
Respondents.

PETITION FOR REHEARING.

In concluding that the "maximum limit" of "nothing" as fixed by the Commission was not subject to review by the District Court, and in concluding that the construction of section 77(c)(12) as vesting the final power in the Commission to deny all compensation does not deprive the petitioner of a vested right the opinion of 7th Circuit states (R. 154):

> "Second, appellants' claim arose after the bankruptcy or reorganization proceedings were instituted. Theirs was not a valid, existing claim at the time of

> bankruptcy. We have no hesitancy in holding that the Congress in enacting this railroad bankruptcy legislation could have provided that no attorneys' fees or expenses should be chargeable against the debtor's estate. *There are no vested rights in favor of those who assist in administering a bankrupt estate, in and to fees for services.* The allowance of such attorneys' fees is based upon the equitable rule that he who renders valuable services should be compensated therefor. But fees not specifically authorized are wholly within the power of the courts to deny. They are also subject to entire disallowance by act of Congress." (Emphasis supplied.)

Since the denial of the petition our attention was called to an appeal taken by a mortgage trustee from a "maximum limit" fixed by the Commission under that section. *The Court there construed that section as applied to a vested right* created by provisions in the mortgage contract (*Re: Chicago and North Western Railway Company*, 35 F. Sup. 230, 258). In the brief filed October 25, 1941, by the mortgage trustee (case No. 7568 in the Seventh Circuit) it is urged that the construction of that section by the District Court would make the section unconstitutional; that *the construction of Section* 77(c)(12) *by the District Court as making the maximum limit binding on the courts as applied to vested rights would make the act unconstitutional.* The District Court concluded that the "maximum limit" of the Commission *could not be disturbed by it even as to vested rights.* Here is *a clear conflict* between the decision of the District Court in construing that section and the opinion in the instant case. Inasmuch as this section was never construed by this Court and it involves the construction of an important question of federal procedure, a rehearing should be granted.

In speaking on behalf of this Court, the Honorable Ex-Chief Justice Hughes stated that a person is entitled to *one appeal as of right*, and as long as such an appeal

is had the question whether or not to allow a writ of certiorari by this court is to be determined not so much by the rights of the parties but by the importance of the question. It is respectfully submitted that *in this case no review was ever had.** The District Court refused to consider the evidence on the question whether or not the decision of the Commission was arbitrary and capricious on the ground that *no matter what the evidence showed the court was powerless, as it could not exceed the zero limit* (R. 9). The Seventh Circuit *affirmed the decision on its mistaken conception that the record containing such evidence was not presented to the District Court* (R. 155).** We have shown in the petition (pp. 29-30) that *the record was presented* to the District Court and that *the Circuit Court made a plain error.* This was *confessed by the respondents* (pp. 17-18) and they tried to explain the matter, but we have shown in our reply (pp. 3-4) that the explanation is unfounded. So, as a matter of fact, *neither court reviewed the evidence to see if the finding of the administrative body has any support in the evidence.* The decision of the Circuit Court being based on a *plain error,* this court will not hesitate to grant the writ (*Dismuke* v. *United States,* 297 U. S. 167, and other

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* The affirmance of a judgment on a plain error as to the status of the record cannot be considered a review in the real meaning of the word.

** The record presents the anamolous situation where a judgment below, based on lack of power to review evidence, is sustained on the ground that the evidence was not presented to the court, and the record demonstrates that the reviewing court was plainly mistaken and the evidence was presented to the trial court. The statement of Mr. Justice Frankfurter in the opinion rendered November 10, 1941 (Re City of Indianapolis Case Nos. 10-13) that "the answer is to be found not in legal learning but in the realities of the record," applies with greater force to the instant case.

authorities cited in *Robertson & Kirkham, on Jurisdiction of Supreme Court,* section 304).

In view of the importance of the question, we ask the Court to reconsider its action in denying the writ, to grant a rehearing, and to allow the issuance of the writ.

Respectfully submitted,

MEYER ABRAMS,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I Meyer Abrams, counsel for the petitioners in the above entitled cause, hereby certify that the Petition for Rehearing is presented in good faith and not for the purposes of delay.

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MEYER ABRAMS, *Counsel for Petitioners.*